

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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JUN 23 1995

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )

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Amendment of the Commission's )  
Regulatory Policies Governing )  
Domestic Fixed Satellites and )  
Separate International Satellite )  
Systems )

IB Docket No. 95-41

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**REPLY COMMENTS OF PANAMSAT CORPORATION**

Henry Goldberg  
Joseph A. Godles  
Daniel S. Goldberg

GOLDBERG, GODLES, WIENER & WRIGHT  
1229 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 429-4900

Its Attorneys

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## SUMMARY

PanAmSat strongly supports the goals of increased competition articulated in the Notice. PanAmSat and many other parties, however, are concerned that the duopoly that exists in the U.S. domestic satellite market will distort existing competition in the international market and frustrate the development of new competition in the domestic market, when the regulatory distinctions between the two markets are removed, as proposed in the Notice.

As demonstrated in the initial comments of PanAmSat and other parties, the Commission has a public interest obligation to rectify the competitive imbalance in the U.S. domestic market before it unleashes the U. S. "duopolists" on the international market. This requires that the Commission:

- lay the ground work for a truly competitive satellite industry by adopting a transition period preceding outright elimination of the existing regulatory distinctions. During the transition period, the Commission should take steps to make the domestic satellite market more competitive.
- assure that U.S. separate satellite systems have immediate access to orbital locations in the U.S. domestic arc, which runs between, approximately, 60° W.L. and 135° W.L. If there are not sufficient locations available to satisfy the demand from U.S. separate satellite systems, domestic satellite operators each should be "capped" at a reasonable number of orbital locations in the domestic arc.
- apply the two-stage financial qualification standard to all FSS satellite applicants, and
- prohibit Comsat at this time from providing domestic services using Intelsat capacity.
- reaffirm that domestic orbital locations are to be used first and foremost for the provision of domestic services. In this manner, the overall level of competition in the satellite industry will be enhanced without compromising important domestic requirements.



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IB Docket No. 95-41

**REPLY COMMENTS OF PANAMSAT CORPORATION**

PanAmSat Corporation ("PanAmSat"), by its attorneys, hereby submits the following reply comments with respect to the Notice of Proposed Rulemaking (the "Notice") in the above-captioned proceeding.

**INTRODUCTION**

As PanAmSat stated in its initial comments, it strongly supports the Commission's competitive goals. PanAmSat and many other parties, however, are concerned that the duopoly that exists in the U.S. domestic satellite market will distort existing competition in the international market and frustrate the development of new competition in the domestic market, when the regulatory distinctions between the two markets are removed, as proposed in the Notice.

While in the 1980s, the FCC's "open skies" domestic satellite policy was an early success of the era of deregulation, the domestic satellite market of the 1990s has suffered from extreme concentration. This concentration resulted from the downturn in demand for satellite capacity in the late eighties and from the combined effect of Commission policies that permitted consolidation of service providers, virtually automatic "renewal" of licenses for follow-on satellites, and a stringent financial showing — to avoid both speculation and comparative hearings — that limited suppliers only to the largest, most well-established companies.<sup>1</sup> This

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<sup>1</sup> Now, of course, the Commission has auction authority and does not need to use financial qualifications as a means to avoid the requirement for comparative hearings in cases of mutual exclusivity. Ironically, however, competitive bidding would be as much an obstacle to new (footnote continued)



has led to a domestic market in which there are few, if any, available orbital locations for new entrants, two companies with some 24 out of 30 domestic in-orbit satellites, and the resultant capacity shortages and rate gauging that one would expect from a duopoly.

As demonstrated in the initial comments of PanAmSat and other parties and as highlighted below, the Commission has a public interest obligation to rectify the competitive imbalance in the U.S. domestic market before it unleashes the U. S. “duopolists” on the international market, where they can use their market power to undermine growing international competition and prevent U.S. separate systems and non-U.S. satellite systems from becoming effective new entrants in the U.S. domestic market.

**I. A TRANSITION PERIOD IS REQUIRED BEFORE THE COMMISSION ELIMINATES THE DISTINCTION BETWEEN INTERNATIONAL AND DOMESTIC SERVICE PROVIDERS.**

While the parties commenting on the Notice generally support the Commission’s proposals to eliminate the regulatory distinctions between separate system and domestic satellite licensees, a number of parties demonstrate that the overriding objective of the rulemaking — the creation of additional competition in the domestic and international markets for satellite services — cannot be achieved if such distinctions are abolished overnight.

Indeed, immediate implementation of the proposals set forth in the Notice would give existing domestic satellite operators an unfair competitive advantage over both separate system and non-U.S. satellite system operators. This not only would reduce the overall level of competition in the satellite services market it would worsen the concentration of the U. S. domestic satellite market, since the most likely new entrants — separate systems and non-U.S. systems — would be overwhelmed by the dominant U.S. domestic operators. Accordingly, to ensure increased and equitable competition, a transition period is required before the Commission can eliminate existing regulatory distinctions.

In this regard, Telecomunicaciones de Mexico (“Telecom”) states that the *de facto* duopoly enjoyed by Hughes and GE Americom in the domestic satellite market, made possible by the fact that they collectively control 29 of the 35 in-orbit

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entrants as is the stringent financial qualification test. In each case, only the most well-established companies need apply.



domestic satellites, would give them an unfair competitive advantage if permitted to offer international satellite services from their domestic arc orbital locations.<sup>2</sup> Telecom estimates that more than 250 transponders on domestic in-orbit satellites are capable of providing service to most of Mexico.<sup>3</sup> In contrast, Telecom notes that non-U.S. domestic satellite operators do not have access to the orbital locations that would allow them to compete effectively in the U.S. domestic market.<sup>4</sup>

As a result, elimination of the distinctions between domestic and international service providers, without the adoption of additional measures, would result in one-way competition: Hughes and GE Americom would be able to participate actively in the international market, but non-U.S. domestic satellite operators would be precluded from participating meaningfully in the domestic market.

Telecom argues against immediate elimination of the regulatory distinctions between domestic and international satellite licensees and urges adoption of a transition period, during which time the U.S. and Mexico can, among other things, renegotiate the distribution of orbital positions.<sup>5</sup> Both Telecom and the Secretary of Communications and Transportation of the United States of Mexico ("SCT") concede that the substantial imbalance in the distribution of orbital locations among the U.S., Canada and Mexico once was justified in light of the disparate domestic requirements of each country.<sup>6</sup> Now that the Commission proposes to free domestic satellite operators from their obligation to serve the U.S. domestic market primarily, however, Telecom and SCT argue that this imbalance must be reassessed,<sup>7</sup> particularly in light of the fact that there are no longer sufficient orbital locations available to meet even the domestic needs of Latin American countries.<sup>8</sup>

In this regard, PanAmSat is concerned that the Notice is likely to provoke other countries to urge a redistribution of orbital locations, thereby threatening the ability of the U.S. to retain sufficient locations to meet U.S. domestic requirements, let alone international ones. Despite these concerns, however, PanAmSat agrees

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<sup>2</sup> Comments of Telecom at 12-13.

<sup>3</sup> Id. at 9.

<sup>4</sup> Id. at 11-12.

<sup>5</sup> Id. at 16.

<sup>6</sup> Comments of SCT at 10; Comments of Telecom at 13.

<sup>7</sup> Comments of SCT at 11; Comments of Telecom at 13.

<sup>8</sup> Comments of Telecom at 10.



that the Commission should seek ways to enable non-U.S. domestic satellite operators to compete in U.S. domestic and international satellite markets, provided that comparable market opportunities exist for U.S.-satellite licensees in such operators' respective home markets.

In addition to Telecom and PanAmSat, GE Americom also urges the Commission to refrain from immediately eliminating the distinctions between domestic and international service providers, although GE Americom argues that simultaneously abolishing the transborder and ancillary service policies will give separate system operators a competitive advantage because they will be free to offer domestic services immediately while domestic licensees will still be required to obtain landing rights on a country by country basis.<sup>9</sup>

While PanAmSat agrees that a transition period is required, GE Americom is incorrect that separate system licensees can obtain a competitive advantage over domestic operators. As discussed above, while domestic operators can provide north-south international satellite services from their numerous domestic orbital locations,<sup>10</sup> separate system operators cannot offer effective domestic satellite services from their international orbital locations, a point made by PanAmSat, Columbia, Orion and Comsat in their respective submissions in this proceeding<sup>11</sup> and acknowledged in the Notice itself.<sup>12</sup>

Additionally, because domestic licensees control virtually all of the domestic orbital positions, separate system licensees are precluded from competing meaningfully in the U. S. domestic market in the future. If, as a result of this rulemaking, there is a redistribution of orbital locations such that other countries (including Mexico, Canada and other countries that need access to current U.S. domestic arc positions to satisfy their domestic and international requirements)

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<sup>9</sup> Comments of GE Americom at i-ii.

<sup>10</sup> It is important to emphasize that access to these orbital locations not only enhances a satellite operator's ability to provide domestic service, but also its ability to provide international service. Unlike separate system licensees, domestic satellite operators are capable of providing from a single satellite international service fully-interconnected with the CONUS and, from a number of locations, full fifty state coverage. This capability gives them a distinct competitive advantage over separate system licensees, who have no practical way of providing domestic service from their present orbital locations.

<sup>11</sup> See Comments of Orion at 7; Comments of Comsat at 6-7; Comments of Columbia at 6; Comments of PanAmSat at 4.

<sup>12</sup> Notice at ¶ 22.



obtain additional positions, the it will be extremely difficult, if not impossible, for separate system licensees to provide competitive domestic service.<sup>13</sup>

Still, PanAmSat agrees with GE Americom that the best way to ensure that one class of licensees does not obtain a competitive advantage over the other is to have a gradual transition toward the elimination of existing regulatory distinctions. In this regard, PanAmSat supports GE Americom's suggestion that both the ancillary service and transborder policies "sunset" at the end of two years.<sup>14</sup> During this period, domestic operators could seek to obtain landing rights for their future international service offerings, domestic arc orbital locations could be made available to separate system licensees and the Commission could resolve orbital assignment and reciprocity issues with Mexico, Canada and other countries that need access to domestic arc orbital locations.

In short, while all parties support the goal of increased competition in the satellite market, a number of fundamental issues must first be addressed. Only after these issues are resolved can fair competition take root.

**II. THE COMMISSION SHOULD FIND THAT THE MARKET FOR DOMESTIC SATELLITE SERVICES IS A SEPARATE PRODUCT MARKET AND THAT HUGHES AND GE AMERICOM ARE DOMINANT WITHIN THAT MARKET.**

PanAmSat strongly supports Telecom's suggestion that the Commission apply certain conditions to dominant domestic satellite operators before permitting such entities to offer international satellite services.<sup>15</sup> PanAmSat is aware, however, that the Commission has declined in the past to define the market for

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<sup>13</sup> In the face of growing pressure on the U.S. domestic arc, PanAmSat has urged the Commission to provide U.S. separate system licensees with domestic arc orbital locations, including at least one fifty-state position. AT&T, however, asks the Commission not to reopen the latest domestic satellite application processing round, arguing that separate system operators had an opportunity to participate in that round if they chose to do so. Comments of AT&T at 3-4 and n. 3. While separate system operators arguably could have participated in the last domestic satellite processing round, separate system operators cannot be faulted for failing to anticipate that the Commission would change its policies and permit the provision of both international and domestic satellite services from a single satellite located in the domestic arc. In this regard, it is important to emphasize that when PanAmSat was considering which orbital position would be optimum for its then-unlaunched first satellite, PAS-1, the Commission indicated that PanAmSat would not be permitted to locate that separate system satellite in the domestic arc.

<sup>14</sup> Comments of GE Americom at ii.

<sup>15</sup> Comments of Telecom at 16.



domestic satellite services as a separate product market.<sup>16</sup> PanAmSat urges the Commission to reexamine this conclusion in this proceeding.

As the courts have made clear, "defining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability...to take significant amounts of business away from each other."<sup>17</sup> Moreover, within each broad product market, submarkets may exist which, in themselves, constitute separate product markets.<sup>18</sup> For instance, college football broadcasts have been found to be a distinct product market within the larger market for video programming<sup>19</sup> and championship boxing matches have been found to constitute a market separate from that for non-championship matches.<sup>20</sup>

Although cross-elasticities of demand provide the most accurate measure of relevant markets, such data often is not available. As a result, other factors are used as "surrogates for cross-elasticity data," including, the uses and functional characteristics of the products, the relative integration of the industries being considered, the extent to which consumers consider various categories of products as substitutes, and price disparities between different products.<sup>21</sup>

All indications, including customer perceptions, support the conclusion that satellite-delivered services constitute a separate submarket within the larger market for interexchange telecommunications services.<sup>22</sup> To begin with, satellite services

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<sup>16</sup> See MCI Corp., 10 FCC Rcd 1072 (1994).

<sup>17</sup> General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795, 805 (8th Cir. 1987) (quotation omitted); see also Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (cross-elasticity of demand used to define product markets); United States v. Du Pont De Nemours and Co., 351 U.S. 377, 380 (1956) (same).

<sup>18</sup> Brown Shoe, 370 U.S. at 325 & n.42; U.S. Anchor Mfg. v. Rule Indus. Inc., 7 F.3d 986, 995 (11th Cir., 1993).

<sup>19</sup> See National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 111 (1984).

<sup>20</sup> See International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 249-252 (1959); see also Theatre Enter. Inc. v. Paramount Film Dist. Corp., 346 U.S. 537 (1954) (first-run movies a separate market).

<sup>21</sup> U.S. Anchor Mfg., 7 F.3d at 995 (citing Grand Union Co., 102 F.T.C. 812, 1041 (1983)).

<sup>22</sup> Hughes Communications Galaxy itself seems to concede that satellite services constitute a separate market and has argued even that there are submarkets within the submarket for satellite-delivered services, since it takes the position that shortages in domestic C-Band capacity are not necessarily remediable by use of domestic Ku-Band transponders. See In re Application of Hughes Communications Galaxy, Inc., File Nos. 33-DSS-ML-94/CSS-94-014- (footnote continued)



are functionally distinct from the terrestrial-based communications network. This fact is plainly evidenced by the inability of domestic satellite users to find alternative point-to-multipoint distribution facilities in the face of the current domestic transponder capacity shortage.

Indeed, the lack of substitutability between satellite transponder facilities and terrestrial communications facilities explains why users of domestic transponders have urged the Commission in this proceeding to take steps to ensure that there is always sufficient satellite capacity for domestic purposes<sup>23</sup> — terrestrial networks simply cannot meet their requirements. Thus, in a very practical sense, terrestrial telecommunications providers cannot “take a significant amount of the business away” from satellite providers.

Within the product market defined by domestic satellite services, as HBO noted in its comments, the market is highly concentrated, dominated by the duopoly of Hughes and GE Americom.<sup>24</sup> Hughes and GE Americom remain dominant. As is always the case when duopoly or monopoly service providers enter new markets, the potential exists for anticompetitive activities (*e.g.*, market leveraging, cross-subsidizing). In light of the Commission’s objectives to enhance competition in the both the domestic and international satellite markets, it must ensure that safeguards are put in place to check the potential for abuses by Hughes and GE Americom.

Allowing domestic satellite operators to compete in the international market before fashioning safeguards to ensure that Hughes and GE Americom compete fairly will defeat the competitive aims of this proceeding. If the Commission does not believe that it has now developed a sufficient record to determine that the market for satellite services is a separate market and that Hughes and GE Americom are dominant within that market, it should to issue a further notice of proposed rulemaking for this purpose, during the transition period that PanAmSat and other parties have proposed.

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MP/ML, Response of Hughes Communications Galaxy, Inc., to Supplemental Reply of PanAmSat, L.P. (filed Nov. 9, 1994) at 5-8.

<sup>23</sup> See, *e.g.*, Comments of HBO at 7; Comments of Networks at 13.

<sup>24</sup> See, *e.g.*, Comments of HBO at 4.



**III. DOMESTIC ARC ORBITAL LOCATIONS SHOULD BE USED FIRST AND FOREMOST FOR THE PROVISION OF DOMESTIC SERVICE.**

Users of domestic satellite services participating in this proceeding voiced concern that, if the Commission permits satellites located in the domestic arc to be used for international service, satellite operators may divert capacity that could be used for domestic service to the international market.<sup>25</sup> As a result, sufficient capacity might not be available to meet domestic requirements.

The comments of both existing and future domestic satellite operators in this proceeding demonstrate that this potential is very real. Thus, DBSC states that, although it has a request pending with the Commission to use five of its requested sixteen frequencies to offer international DBS service over its domestically authorized satellite, in response to the "broad policy tentatively adopted in the NPRM, it [now] should be free to use as much or as little of its satellite capacity for international DBS service as it prefers... ." <sup>26</sup> Hughes too argues that satellite operators should be able "to provide either domestic or international service, or both, as their own business judgments may dictate, without the need to seek additional Commission authorization." <sup>27</sup>

The potential for domestic operators to use scarce domestic arc orbital positions for international service prompted HBO to urge the Commission to adopt safeguards "to ensure that domestic services are not sacrificed by desires of satellite operators (foreign and domestic) to use prime U.S. orbital positions for international services." <sup>28</sup> Accordingly, HBO asks the Commission to "reaffirm that the domestic arc is to be used first and foremost to meet the needs of domestic communications users" and, in doing so, to consider requiring U.S. licensed satellite operators using domestic arc orbital locations to provide domestic service if and when a domestic capacity shortage develops. <sup>29</sup>

PanAmSat strongly supports HBO's proposals. Indeed, in its initial comments in this proceeding, PanAmSat argued that during the transition period in

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<sup>25</sup> Comments of HBO at i; Comments of Networks at 13; Comments of GCI at 4 and n.6; Comments of ICG at 3.

<sup>26</sup> Comments of DBSC at 9-10.

<sup>27</sup> Comments of Hughes at 3.

<sup>28</sup> Comments of HBO at i.

<sup>29</sup> *Id.* at 7.



which the Commission must make domestic orbital locations available to separate system licensees, domestic satellite licensees who wish to use all or part of their satellites for international services should be required first to seek the Commission's explicit authorization to do so.<sup>30</sup> This requirement would give the Commission the opportunity to make a determination that such change in satellite usage is in the public interest, taking into account the supply of domestic C- band and Ku- band capacity, regulatory parity with U.S. separate system licensees (including whether such parity actually translates into comparable market access), whether there is unfair tying of, or cross-subsidization between, domestic and international services, and similar public interest factors.<sup>31</sup>

The Commission has an affirmative obligation to ensure that adequate satellite capacity exists to meet the needs of domestic users. Accordingly, once the transition period ends and U.S. FSS satellite operators are permitted to provide either domestic or international satellite service, it should still be the policy of the Commission that domestic arc orbital positions are to be used first and foremost for the provision of domestic satellite services.<sup>32</sup>

#### **IV. THE COMMENTS DO NOT JUSTIFY USE OF THE DOMESTIC FINANCIAL QUALIFICATION STANDARD.**

The Commission proposes to apply the domestic satellite full financial showing to all satellite applicants, stating that all applicants should be able to obtain sufficient financing on the basis of the expectation of future revenues from the provision of domestic service and, further, as a result of the fact that Intelsat's recent streamlining of the Article XIV(d) consultation process removed uncertainties associated with obtaining approvals to operate a separate satellite.<sup>33</sup> Not surprisingly, Hughes, GE Americom and AT&T support the Commission's proposal.<sup>34</sup> These entities, after all, are (or are affiliated with) the largest corporations in the world and, therefore, can satisfy this rigorous financial showing simply by submitting their balance sheets, with a perfunctory statement that

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<sup>30</sup> Comments of PanAmSat at 6.

<sup>31</sup> Id.

<sup>32</sup> PanAmSat believes that this approach will ensure that there is always a sufficient supply of capacity to satisfy domestic requirements and, as a result, that the Commission need not require satellite operators to make some capacity available on a common carrier basis.

<sup>33</sup> Notice at ¶ 29.

<sup>34</sup> Comments of AT&T at 8; Comments of Hughes at 15-17; Comments of GE Americom at 4.



sufficient funds will be made available for the satellite project. In this regard, the Commission's proposal provides the dominant domestic operators with yet another competitive advantage over other operators.

The rationale underlying the Commission's proposal, however, is flawed. First, as PanAmSat, Orion and Columbia all point out, separate system licensees cannot effectively offer domestic service from their international satellite orbital locations,<sup>35</sup> a point acknowledged by the Commission itself.<sup>36</sup> Moreover, because there are few, if any, available domestic slots, they will not be able to provide such service in the future. As a result, they cannot obtain financial commitments based on the expectation of future domestic revenues.

Second, while streamlining of the Article XIV(d) consultation process removes a degree of uncertainty surrounding the ability to operate a separate system satellite, operators still must obtain market access on a country-by-country basis, as well as frequency coordinate their satellites with other operators in an increasingly congested global orbital arc.<sup>37</sup> These factors are the source of a high level of continued uncertainties associated with the operation of a separate satellite.

Hughes and AT&T make the additional argument that the Commission's proposal furthers its policy against the warehousing of scarce orbital positions.<sup>38</sup> While PanAmSat agrees that the Commission must be vigilant in ensuring that applicants do not warehouse orbital locations, application of the two-stage financial showing, as Columbia points out, has been highly successful, resulting in the establishment of three operating separate satellite systems.<sup>39</sup> Additionally, other mechanisms are available to prevent unqualified applicants from tying up orbital locations, including reducing the period during which an applicant under the two-stage approach is required to make its full financial showing.

In sum, arguments in favor of applying the domestic financial qualification standard to all satellite operators are unavailing: there is still a high degree of uncertainty associated with obtaining market access and completing technical

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<sup>35</sup> Comments of Columbia at 6; Comments of Orion at 7-8; Comments of PanAmSat at 4-5.

<sup>36</sup> Notice at ¶ 22.

<sup>37</sup> Comments of Columbia at 7; Comments of Orion at 6-7.

<sup>38</sup> Comments of AT&T at 8; Comments of Hughes at 15.

<sup>39</sup> Comments of Columbia at 7.



coordinations, operators of satellites located outside of the domestic arc cannot provide effective domestic service, alternative mechanisms exist to prevent warehousing of orbital locations, and the separate system financial standard has encouraged the development of a vibrant separate satellite system industry.

Application of the domestic financial standard will permit only the Hughes and GE Americoms of the world to launch and operate new satellites in the future. Accordingly, to promote competition in the market for satellite services — the stated objective of the rulemaking — as well as general notions of regulatory parity, the Commission should apply the two-stage financial showing to all FSS satellite applicants.

**V. COMSAT SHOULD NOT BE PERMITTED TO OFFER DOMESTIC SERVICE USING INTELSAT CAPACITY.**

With the exception of Comsat and Rockwell Industries, all parties addressing the issue urge the Commission not to allow Comsat to provide domestic service using Intelsat capacity. The commenters overwhelmingly agree that the continued existence of Comsat's special privileges and immunities and the potential for Comsat to cross-subsidize between its competitive and monopoly rates make it inappropriate at this time to allow Comsat to use Intelsat capacity to offer domestic satellite services.<sup>40</sup> Moreover, a number of parties concur with PanAmSat that, in light of the ongoing review concerning the restructuring of Intelsat, it would be particularly premature at this time to grant Comsat authority to offer domestic services via Intelsat capacity.

**CONCLUSION**

PanAmSat strongly supports the goals of increased competition articulated in the Notice. In order for those goals to be achieved, however, competition must be fair. In this regard, PanAmSat urges the Commission to: (i) lay the ground work for a truly competitive satellite industry during a transition period preceding outright elimination of the existing regulatory distinctions, (ii) determine that domestic satellite services comprise a separate market and that Hughes and GE Americom are dominant in that market, (iii) apply the two-stage financial qualification standard to

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<sup>40</sup> See, e.g., Comments of GE Americom at 12; Comments of Columbia at 9; Comments of AT&T at 14; Comments of Orion at 11.



all FSS satellite applicants, and (iv) prohibit Comsat at this time from providing domestic services using Intelsat capacity.

Additionally, to ensure that there is always sufficient capacity available to meet the needs of domestic users, the Commission should reaffirm that domestic orbital locations are to be used first and foremost for the provision of domestic services. In this manner, the overall level of competition in the satellite industry will be enhanced without compromising important domestic requirements.

Respectfully submitted,

PANAMSAT CORPORATION

By: /s/ Joseph A. Godles

Henry Goldberg

Joseph A. Godles

Daniel S. Goldberg

GOLDBERG, GODLES, WIENER & WRIGHT  
1229 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 429-4900

Its Attorneys

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